BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GLAFIRA CAMACHO	)	
Claimant	)	
VS.	)	
	)	
NORCRAFT COMPANIES, LLC	)	
Respondent	)	Docket No. 1,062,102
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the September 20, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Conn Felix Sanchez of Kansas City, Kansas, appeared for claimant. Brent M. Johnston of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 19, 2013, preliminary hearing and exhibits thereto; the transcript of the April 9, 2013, preliminary hearing and exhibit thereto; the transcript of the January 22, 2013, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant asserts that while working for respondent, she sustained right knee and ankle injuries on October 7, 2011, when she tripped over a gun cord and fell. Respondent asserts claimant's fall was the result of dizziness or lightheadedness, a personal risk and, therefore, claimant's injuries are not compensable. The ALJ's September 20, 2013, preliminary hearing Order denied claimant's request for compensation because claimant's fall resulted from a personal risk.

In her Application for Review, claimant raised as an issue:

> 3. In the alternative, K.S.A. 44-508(f)(3) is impermissibly retroactive and can only be applied to a new personal medical condition that the Claimant developed after May 15, 2011. And cannot be applied to the Claimant's pre-existing medical conditions that may have existed prior to May 15, 2011. As K.S.A. 44-508(f)(3) applies new burdens and loss of rights for a medical condition that arose prior to May 15, 2011. In addition, the enabling statute for K.S.A. 44-508(f)(3) is not explicitly retroactive.[1]

Claimant's brief to the Board did not address the aforementioned issue and, therefore, the Board deems that issue abandoned by claimant.

The sole issue is: did claimant sustain a personal injury by accident on October 7, 2011, arising out of and in the course of her employment with respondent? Specifically, was claimant's fall the result of a personal or work-related risk?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's Application for Hearing alleges that on October 7, 2011, she sustained a sprained ankle and knee. The cause of the accident was listed as: "packing doors and when turning over & foot got caught with carpet and caused her to fall down."[2]

Three preliminary hearings have been held in this matter. Claimant speaks Spanish and an interpreter was used at the January and September 2013 preliminary hearings. No testimony was taken at the April 2013 preliminary hearing. At the first preliminary hearing, which was held on January 22, 2013, claimant testified that on October 7, 2011, she tripped over a "gun" cord and fell to the ground. She also indicated the floor was cracked. Claimant was using a staple gun to pack a door. Claimant testified she was moving at a quick pace. Sherrill Garza, who works for respondent in human resources and as a safety specialist, was called to the scene and provided claimant a bag of ice for her injured right knee.

Claimant has diabetes and takes insulin. Claimant testified her normal blood sugar levels range from 120 to 140. During the two weeks prior to October 7, claimant had two experiences of dizziness, lightheadedness and fainting. After claimant's October 7 fall, Ms. Garza tested claimant's blood sugar level. Ms. Garza, who had never before tested claimant's blood sugar, used claimant's machine to conduct the blood sugar level test.

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[1] Application for Review at 2 (filed Oct. 2, 2013).

[2] Application for Hearing (filed Aug. 28, 2012).

Ms. Garza testified that when she arrived where claimant had fallen, claimant indicated she was dizzy and lightheaded. Ms. Garza specifically asked claimant what caused the fall and claimant said she was dizzy and fell. Claimant complained of right knee pain. Ms. Garza asked claimant about her sugar and what she ate. Claimant gave Ms. Garza permission to conduct a blood sugar level test. The test results indicated claimant's sugar level was in the high two hundreds. Ms. Garza indicated claimant had issues with dizziness and lightheadedness in the two weeks prior to the accident.

On cross-examination, Ms. Garza admitted she did not check the carpet to see if there was something on which claimant might have tripped. She also acknowledged the plant was hot and some people have problems dealing with the heat.

Claimant sought treatment on her own at the Newton Medical Center emergency room on October 7, 2011. Claimant testified her husband, who apparently also works for respondent, but in another building, took her to the emergency room. The Newton Medical Center notes stated:

> This patient comes into the ER complaining of a fall at Norcraft. She apparently got lightheaded and when she turned she lost her balance and fell to the floor. The fall was unwitnessed and it is unknown if there was LOC. She has a history of getting lightheaded when her blood sugars get low. Thirty minutes after she fell they checked her blood sugar and it was 260. Yesterday she had an episode of lightheadedness in which she was hypoglycemic, but that was witnessed and the people around her caught her and lowered her to the floor. . . .[3]

On November 14, 2011, claimant was seen at Partners in Family Care of Moundridge, Kansas, by Dr. Kathryn Hayes for an onset of leg pain associated with a fall at work. The notes do not mention the cause of the fall. Dr. Hayes assessed claimant with a right ankle sprain, sprains and strains of the right knee and uncontrolled Type 2 diabetes. Hypertension and uncontrolled Type 2 diabetes were listed as two of claimant's current problems in the notes from the aforementioned visit.

At the request of her attorney, claimant was evaluated by Dr. Pedro A. Murati on October 17, 2012. The doctor did not have the Newton Medical Center records and listed claimant's accident date as August 7, 2011. Dr. Murati's report mentions claimant was seen by Dr. Hayes from November 14, 2011 to January 5, 2012. Dr. Murati's report indicated claimant tripped over a hose while stapling, fell forward and hit her right ankle, right knee and chin on the floor. Dr. Murati diagnosed claimant with probable right lower extremity deep vein thrombosis, right patellofemoral syndrome, right ankle sprain, right Achilles bursitis, right plantar fasciitis and metatarsalgia of the second and third metatarsal heads on the right. The doctor opined claimant's accident was the prevailing factor

[3] P.H. Trans. (Apr. 9, 2013), Resp. Ex. A.

causing her diagnoses. Dr. Murati indicated claimant's right knee condition was aggravated by a February 2012 injury.

The ALJ issued two preliminary hearing orders on January 23, 2013. One preliminary hearing order required claimant to undergo an independent medical evaluation with Dr. John Estivo. Dr. Estivo was to offer opinions as to the diagnosis of right ankle and knee complaints, recommendations for treatment and whether claimant's alleged accident of October 7, 2011, was the prevailing factor in causing claimant's injury, need for treatment or resulting impairment or disability, if any. The second preliminary hearing order issued on January 23 required respondent to pay up to the statutory limit Dr. Murati's medical bill as an unauthorized medical expense and took under advisement claimant's preliminary hearing requests pending the report from Dr. Estivo. Neither party appealed the January 23 preliminary hearing orders.

A second preliminary hearing was held on April 9, 2013. No witnesses testified and respondent offered into evidence claimant's medical records from Newton Medical Center. An April 9, 2013, preliminary hearing Order denied claimant's requests for benefits, stating:

> Respondent's application for preliminary hearing requests termination of benefits previously awarded, following a preliminary hearing on January 22, 2013. The evidence presented today undermines Claimant's preliminary hearing testimony, and renders it more likely than not that Claimant's fall of October 7, 2011 occurred as a result of a personal risk.[4]

The April 9, 2013, preliminary hearing Order was issued before claimant was evaluated by Dr. Estivo, as the evaluation was delayed because Dr. Estivo did not receive pre-payment of his evaluation fee. In her brief to the Board, claimant argues there were procedural errors committed by the ALJ, to wit: (1) failing to ask the parties if they agreed to hold the preliminary hearing in Saline County when claimant's accident occurred in Harvey County and (2) the ALJ stated he needed the testimony of claimant, and despite not allowing a continuance, rescinded his January 23, 2013, Order. This Board Member will not address those issues as claimant did not contemporaneously object to holding the preliminary hearing in Saline County and did not appeal the April 9 preliminary hearing Order.

Claimant was evaluated by Dr. Murati a second time on May 22, 2013. His report indicates he reviewed October 17, 2012, Newton Medical Center records and records from Dr. Hayes, Wichita Clinic and Via Christi Clinic. Dr. Murati's report mentions claimant was seen by Dr. Hayes from November 14, 2011, to January 5, 2012, but does not indicate he reviewed Dr. Hayes' records prior to November 14, 2011. There is nothing in Dr. Murati's report indicating claimant had fainting spells prior to her accident. Dr. Murati diagnosed

[4] ALJ Order (Apr. 9, 2013) at 1.

claimant with uncontrolled hypertension, right patellofemoral syndrome, right ankle sprain, right Achilles bursitis, right plantar fasciitis and metatarsalgia of the second and third metatarsal heads on the right. The doctor opined that with the exception of uncontrolled hypertension, claimant's diagnoses were within all reasonable medical probability a direct result of the work-related injury.

Dr. Estivo examined claimant on August 2, 2013, and reviewed her medical records from Newton Medical Center and Dr. Hayes. Dr. Estivo's report indicated that in June 2006, claimant had an MRI of her head for evaluation of seizures. In July 2006, claimant saw Dr. Hayes for high blood sugars and fainting spells. Claimant was diagnosed by Dr. Hayes with hypertension, hyperlipidemia, abdominal pain and depression. Claimant's blood sugar was over 400 and she was taking cardiac medications. Claimant was hospitalized by Dr. Hayes. Since July 2006, Dr. Hayes continued to treat claimant for diabetes, hypertension and a myriad of health problems. Dr. Estivo's report indicated that two years before seeing Dr. Hayes in July 2006, claimant reported she was hospitalized for uncontrolled diabetes after fainting at work.

Claimant told Dr. Estivo of tripping over an air compressor cord while packing doors. Claimant indicated she told emergency room personnel at Newton Medical Center she tripped over the cord and did not complain of dizziness. However, Dr. Estivo reviewed claimant's discovery deposition and noted claimant admitted to having two episodes of having low blood sugars and experiencing dizziness in the two-week period prior to the October 7, 2011, fall and that she had fainted several times when it was hot while working for respondent. Dr. Estivo stated in his report:

> Considering the previous history of this patient having dizzy spells and fainting spells, dating back to at least 2006, and the fact that her story is completely different as compared to what she reported to the emergency room physician on the same day of the accident, it would be my opinion her accident arose out of a risk personal to Ms. Camacho or from an idiopathic cause rather than a work-related injury.[5]

At the September 19, 2013, preliminary hearing, claimant again testified she tripped over the cord of an air-assisted staple gun she was using. Claimant denied being dizzy before she fell. Claimant testified she went to the emergency room at Newton Medical Center on October 7, 2011, on her own and did not have anyone interpret for her. She did not let anyone at respondent know she was going to the hospital. Later a friend came to interpret, but claimant was already in a room, in bed, when the friend arrived. Claimant testified:

> Q. (Mr. Sanchez) What exactly did you tell them was the cause of the accident?

[5] P.H. Trans. (Sept. 19, 2013), Resp. Ex. A at 6.

> A. (Claimant) The doctor asked me what had happened and I told her that I fell at work.[6]

The ALJ found claimant's October 7, 2011, fall was not compensable, stating:

> As the court determined at the hearing on April 9, 2013, the court finds and determines that it is more probably true than not that Claimant fell as a result of a personal condition. **K.S.A. 2011 Supp 44-508(f)(3)(A)** excludes from the phrase, "arising out of and in the course of employment," accidents or injuries which arise from a neutral risk or risk personal to the worker. Absent evidence to the contrary, Claimant's risk of fainting was a personal risk.[7]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[9]

K.S.A. 2011 Supp. 44-508(f)(3)(A) states:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
>
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

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[6] *Id.* at 12.

[7] ALJ Order (Sept. 20, 2013) at 1.

[8] K.S.A. 2011 Supp. 44-501b(c).

[9] K.S.A. 2011 Supp. 44-508(h).

Claimant failed to prove by a preponderance of the evidence that tripping over a compressor cord caused her fall and injuries. It is more likely claimant's fall was caused by a personal risk or idiopathic cause. Ms. Garza testified claimant said the fall was caused when she became dizzy and fell. Emergency room notes from Newton Medical Center indicated claimant reported becoming lightheaded, losing her balance and falling.

Claimant has a history of uncontrolled diabetes, hypertension and fainting spells. By her own admission, claimant had two dizzy or fainting spells in the two weeks before her fall at work. Neither of Dr. Murati's reports indicates he was aware Dr. Hayes treated claimant since 2006 for hypertension, diabetes and fainting spells or that she underwent a June 2006 MRI of the head for an evaluation of seizures. Dr. Estivo, who was aware of claimant's medical history of uncontrolled diabetes and fainting spells, opined claimant's fall was not work related, but rather resulted from an idiopathic cause or personal risk.

Claimant failed to prove her personal injury by accident arose out of and in the course of her employment with respondent. This Board Member concurs with ALJ Moore that claimant's fall was most likely the result of a personal risk. Under K.S.A. 2011 Supp. 44-508(f)(3)(A), the term "arising out of and in the course of employment" is not construed to include accidents or injuries which arise out of a risk personal to the worker.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, the undersigned Board Member affirms the September 20, 2013, preliminary hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of December, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

[10] K.S.A. 2012 Supp. 44-534a.

[11] K.S.A. 2012 Supp. 44-555c(k).

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Honorable Bruce E. Moore, Administrative Law Judge

Honorable Thomas Klein, Administrative Law Judge